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In The

Supreme Court of the United States

October Term, 1994

THE CITY OF CASTLE ROCK, and
GILBERT R. VAUGHN, in his Official
Capacity and Individually,

Petitioners,

v.

MICHAEL D. HUSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

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TABLE OF CONTENTS

Page

STATEMENT OF CASE 1

A. Nature Of The Case, Course Of Proceedings And Disposition Below 1

B. Statement Of Facts 2

REASONS FOR DENYING THE WRIT 11

Summary of Argument 11

I. There was substantial evidence supporting (1) the district court's determination that Vaughn was a policymaker and (2) the jury's verdict of municipal liability finding that Huson's civil rights were deprived pursuant to official policy, under an instruction – unchallenged by petitioners below as a correct statement of the law – that official policy includes an unconstitutional act resulting from a policymaker's reckless disregard for or deliberate indifference to Huson's rights 12

II. The courts below correctly determined that no reasonable officer would have believed there was probable cause for Huson's arrest and that Vaughn was not entitled to qualified immunity 19

A. The courts below correctly applied the proper qualified immunity standard 19

1. Petitioners stipulated at trial and conceded on appeal that the law was clearly established at the time of the arrest 20

TABLE OF CONTENTS – Continued

Page

2. The courts below correctly applied the qualified immunity standard when they asked whether a reasonable officer could have believed that probable cause existed 21

B. The district court properly submitted the issue to the jury 23

C. No reasonable officer could have believed there was probable cause to arrest Huson ... 25

III. CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993) 19, 23

Anderson v. Creighton, 483 U.S. 635 (1987) 19, 22, 23

Beck v. Ohio, 379 U.S. 89 (1964) 28

BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986) 27

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 18

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 12, 13, 16, 17

Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991) 19

Cordero v. DeJesus-Mendez, 867 F.2d 1 (1st Cir. 1989) 17

Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989) 17

Griffin v. United States, 112 S.Ct. 466 (1991) 18, 19

Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985), *cert. den.*, 106 S.Ct. 1635 (1986) 17

Hunter v. Bryant, 112 S.Ct. 534 (1991) 21, 22, 23, 24

Huson v. City of Castle Rock and Vaughn No. 92-35186 (9th Cir. 1993) ..... *passim*

Huson v. City of Castle Rock and Vaughn, No. 90-35529 (9th Cir. Mar. 22, 1991) ..... *passim*

Jett v. Dallas Independent School District, 491 U.S. 701 (1989) 13

Los Angeles v. Heller, 475 U.S. 796 (1986) 12

Malley v. Briggs, 475 U.S. 335 (1986) 22

TABLE OF AUTHORITIES – Continued

Page

McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989)..... 19

Mitchell v. Forsyth, 472 U.S. 511, n.10 (1985)..... 23

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).....12, 17

Owen v. City of Independence Missouri, 445 U.S. 663 (1980)..... 12

Pembaur v. Cincinnati, 475 U.S. 469 (1986).... 11, 12, 14, 15

Small v. Inhabitants of City of Belfast, 796 F.2d 544 (1st Cir. 1986)..... 17

Smith v. Wade, 461 U.S. 30 (1983)..... 2

Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989)..... 17

Sunkist Growers v. Winckler & Smith Co., 370 U.S. 19 (1962)..... 2

Williams v. Butler, 863 F.2d 1398 (8th Cir. 1988) (*en banc*), *cert. den.*, 109 S.Ct. 3215 (1989)..... 17

Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907)..... 18

STATUTES

42 U.S.C. §1983.....1, 12, 14, 15, 18

RULES

Supreme Court Rule 10..... 11

STATEMENT OF CASE

A. Nature Of The Case, Course Of Proceedings And Disposition Below.

This action was brought by Plaintiff-Respondent Michael Huson ("Huson") against Defendants-Petitioners Gilbert Vaughn ("Vaughn"), the Chief of Police of the City of Castle Rock, Washington, and the City of Castle Rock ("Castle Rock") (collectively "petitioners") arising out of Vaughn's arrest of Huson without probable cause and an aborted criminal prosecution of Huson for theft based on Vaughn's incompetent, reckless and prejudiced investigation. After dismissal of the prosecution, Huson brought this action for damages for constitutional violations under 42 U.S.C. §1983 and for state law claims.

On the eve of trial Vaughn moved for summary judgment, arguing that he was entitled to qualified immunity. CR 21, 22.[1] The motion was denied. CR 45. Vaughn brought an interlocutory appeal, and the 9th Circuit granted Huson's Motion for Summary Affirmance, holding that "[i]t is clearly ascertainable that deposition and police records, viewed in the light most favorable to [Huson], showed that a reasonable police officer in [Vaughn's] position would have known that he lacked probable cause to arrest [Huson]. . . . " *Huson v. City of Castle Rock and Vaughn*, No. 90-35529 (9th Cir. Mar. 22,

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[1] References to documents in the Excerpt of Record filed with Petitioners' Opening Brief to the Ninth Circuit are designated "ER"; references to documents contained in the Supplemental Excerpt of Record submitted by Respondent to the Ninth Circuit are designated "SER"; references to documents in the District Court Clerk's Record, but not included in the excerpts of record, are designated "CR"; references to the Trial Transcript are designated "TR" with volume and page number following; and references to Exhibits are designated "EX" with the number of the exhibit following.

1991) (herein "*Huson I*") at 2. (*Huson I* appears at CR 73 SER at 1.) The evidence presented at trial was substantially identical to the evidence on which the 9th Circuit denied Vaughn's interlocutory appeal. At the close of Huson's case, the court denied petitioners' motion for a directed verdict on, *inter alia*, qualified immunity. The jury returned its verdict for Huson on his claim that Vaughn arrested him without probable cause and on state law false arrest and malicious prosecution claims and determined that Vaughn was not entitled to qualified immunity. ER 45.

Beyond awarding compensatory damages, the jury awarded punitive damages against Vaughn individually (*id.*), thus finding that Vaughn acted either with evil motive or intent to cause injury to Huson or with reckless or callous indifference to Huson's federally protected constitutional rights. *Huson v. City of Castle Rock and Vaughn* No. 92-35186 (9th Cir. 1993) (herein "*Huson II*"), at A-12 (*Huson II* is reprinted in the Appendix to the Petition at A-1 through A-18); TR V-735; *Smith v. Wade*, 461 U.S. 30 (1983). Castle Rock was found liable for Vaughn's actions which were found to be carried out by Vaughn as a policy maker for the City.

The district court denied petitioners' motion for judgment notwithstanding the verdict. The 9th Circuit affirmed in an unpublished opinion (*Huson II*) and denied a petition for rehearing. No judge requested a vote on petitioners' suggestion for rehearing en banc.

B. Statement Of Facts.

Huson is a life-long resident of Castle Rock, population 2,000. Huson had been mayor for 16 years and participated in numerous civic groups, including the Castle Rock Lions Club. TR II-63, 164, 185, 188-189, 198; EX 5-A,B SER 56. A 47-year old retired baker, Huson had

never been the subject of a criminal investigation, much less arrested or charged with a crime. TR II-185, III-315.

Continuing his community service after leaving public office in 1987, Huson was licensed to provide foster care in his home and responded to an appeal from the Toutle River Boys Ranch ("Toutle River"), a state detention facility for juveniles. TR III-359. In February, 1988, Carl Lorton, age 17, a Toutle River inmate, was placed in Huson's home for what was to be Lorton's last three months of custody. TR II-199. Lorton had been committed to Toutle River because of an "extensive criminal history," including numerous thefts. TR II-70,199, III-351.

In March 1988, Lorton was caught stealing money from Huson and another boarder. TR I-89, II-200-03, III-347; EX 1-A SER 3. Huson and Lorton's counselor at Toutle River decided not to take action, conditioned on Lorton's subsequent good behavior. TR III-348. Shortly thereafter, another boy from Toutle River, Alex Neal, age 17, also was placed in Huson's home. TR II-203.

For years Huson had held various offices in the Lions Club and often handled its money. TR II-205, IV-628. On the weekend of May 14-15, 1988, the club opened its annual concession stand at a community event. Huson was co-chair of the stand and shared responsibility for its funds. TR II-205, IV-621. On Saturday evening, May 14, Huson took the funds home for safekeeping, and returned with them on Sunday. TR II-206, III-216-17. Because of slow sales on Sunday, Huson went home early, leaving Carroll Woodworth, his co-chair, in charge of the stand and the funds. TR III-218, IV-620. After the stand closed, Woodworth brought the money to Huson for safekeeping (TR IV-620-21), even though Huson had not asked him to do so. He handed it to Huson in Huson's back yard (TR IV-622-23) while Lorton and Neal were in the yard (TR III-219; EX 1-M SER 38). Huson locked the money in his car trunk. TR III-225.

The next morning, Huson found that Lorton had fled and the money was gone (TR III-227-28; EX 1-A SER 3). Two handwritten notes were in Lorton's bedroom. In one, Lorton claimed he suddenly decided to leave town with some friends from California. The other note contained a tally corresponding in amount and denominations with the stolen funds. TR III-227-232; EX 1-A through C SER 3-6. Huson immediately reported the theft and Lorton's flight to the police, gave them the two notes (TR III-228; EXs 1-A & 28 SER 3 and 77) and identified the handwriting as Lorton's. EX 1-A SER 3. The police reported the amount listed in the "theft tally," approximately $1200, as the amount of the theft. *Id.* Huson told the police about Lorton's commitment to Toutle River for thefts and his prior thefts at Huson's home in March. TR I-85-90; EX 1-A SER 3. He also gave them a physical description of Lorton. *Id.* The police radioed a bulletin to other police agencies about the Lions Club theft. *Id.*

The investigating officers determined there was probable cause to arrest Lorton and that a warrant should be requested for his arrest. TR I-95, III-283-84; EX 1-D SER 7. With the agreement of a prosecuting attorney, the officers asked that a warrant be requested for *Lorton's* arrest and "underst[ood] that a warrant would be issued. . . . " TR II-28. Vaughn "concurred . . . that a warrant request [for *Lorton's* arrest] was appropriate." TR II-23-24, 28-29. Vaughn was responsible to follow up the warrant request (TR III-381), but despite having ample time, he failed to do so (TR III-381).

Vaughn acknowledged that, even without a warrant, Lorton "could have been arrested based on probable cause, had [Vaughn] been able to locate him. . . . " TR II-30. In the week after the theft Vaughn had access to information as to Lorton's likely whereabouts (EX 1-D SER 7), but took no steps to return him to custody, arrest

him for theft or even learn if a warrant was issued (TR II-29-31).

Two weeks later, a local bank officer called Vaughn to say he had heard that Huson made some unusual cash deposits shortly after the theft. TR II-32. Although Vaughn admittedly had personal animus towards Huson and had worked against Huson's reelection as mayor (TR II-33-35), Vaughn immediately took over the investigation rather than leave it to other competent officers or refer it to another police agency. TR II-23-24,29,38. Unlike the department's lethargic investigation of Lorton, Vaughn immediately contacted Kenneth Anderson, a Lions Club member who had been at the concession stand, visited with the bank teller, and drafted an affidavit for a subpoena to get Huson's bank records, all on the same day. TR II-37, 42, 46, 48; EXs 1-E through H SER 8-14.

Anderson told Vaughn that on Saturday night Huson took the money home, rather than put it in the city vault. However, it was inappropriate to put private funds into the city vault (TR IV-609) and Vaughn was aware that the money was stolen on *Sunday* night, not *Saturday* night. Vaughn also learned that Huson returned the money on Sunday that he had taken home Saturday for safekeeping. TR IV-620. Before conducting any further investigation, Vaughn inexplicably told Toutle River personnel it looked like the fugitive "Carl [Lorton] is not the suspect in the money theft." EX 5-J SER 68.

Vaughn next obtained Huson's deposit history and learned that the deposits made following the Lions Club theft had *different* denominations than the stolen money. TR II-148. The records also showed that the deposits were not significantly out of character for Huson either as to the amounts or the time of the month when they were deposited. TR IV-502; EX 1-I through K SER 17-35. Vaughn also knew that Huson had income from rental properties and foster care and had family and friends, potential loan sources. TR II-65, 108, 198-99.

A month later, Vaughn finally looked up and interviewed Lorton. EX 1-O SER 48. Lorton admitted he was in the yard the afternoon Huson was given the money (EX 1-M SER 40), denied writing the notes, except for the words that appear at the top of the "theft tally" (TR II-79-80), and claimed that he fled at 1:30 a.m. to "see Martin [Flores (an alleged tree planting contractor)] about when he was going to Alaska to go plant trees." EX 1-L SER 41-43. Lorton advanced the incredible story – inconsistent with both his flight from custody and the "I'm leaving for California" note – that "all along [he] had planned to go to [Flores'] and go to Alaska." *Id.* Lorton next claimed, also incredibly, that he rode his bicycle to Flores' home in nearby Kelso, only to be told when he arrived there (shortly after 1:30 a.m.) that "[Flores] had already went to work." *Id.* Finally he claimed that he then "[w]ent to the bus station in [the adjacent town of] Longview and waited for the bus to come" to go to Seattle (*id.*), 130 miles away.

Vaughn knew "[Lorton] was not being totally truthful with [him]," at least in denying that he had written the "I'm leaving for California" note and about a withdrawal of money Lorton claimed he used to buy a bus ticket. TR II-80, 82. At the end of the interview Vaughn asked Lorton to take a polygraph examination to test the veracity of his incredible and inconsistent stories, but Lorton refused. TR II-112. Vaughn had handwriting samples available to him for having an analysis done. Yet despite believing Lorton lied in denying that he wrote the "I'm leaving for California" note, Vaughn failed to have either note analyzed to determine if Lorton had written them.[2]

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[2] For Lorton, he had samples in the file consisting of Lorton's written statement (EX 1-N SER 45), property inventories from Toutle River (TR II-101-102), and the writing at the top of the "theft tally" that Lorton admitted was his own. For Huson, many writing samples were available: deposit slips and other banking records which Vaughn had in his file (EX 1-J SER 17),

Vaughn did no background check of Lorton. He neither checked Lorton's criminal record, reviewed his extensive Toutle River file, inquired into the previous thefts at Huson's home, nor spoke with Huson about Lorton or anything else regarding the theft. TR II-48, 62, 84, III-237, 246. Vaughn did not even speak to Huson during Huson's repeated visits to the police station inquiring about when Lorton would be arrested. TR III-237.[3]

Next, Vaughn interviewed Alex Neal, the other boy placed in Huson's home. Neal said that the night Lorton fled, Lorton woke him up and asked to put some of his (Lorton's) property into Neal's closet. EX 1-Q SER 51. Lorton gave no explanation to Neal for his sudden departure. *Id.*

After this incomplete investigation, Vaughn consulted with deputy prosecutor Randolph Furman,[4] but did not provide complete and accurate information:

– Vaughn did not tell Furman that Vaughn's own officer, with the concurrence of another prosecutor, already had requested a warrant for Lorton's arrest. TR III-291.

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records about foster care which were at Toutle River (EX 5-A SER 56), many city documents on which Huson had written as mayor for 16 years, records of civic groups of which he had been an officer, including the Lions Club, and records of various agencies related to his bakery business.

[3] Lorton's criminal record showed that from January 1982, when Lorton was 12 years old until he was sent to Toutle River in 1986, he had 16 serious charges brought against him, including 6 thefts, 2 burglaries, 2 parole violations, a weapons offense, an escape (in addition to his flight from Huson's custody), a taking of a motor vehicle, 3 criminal trespasses, and a burglary. EX 16 SER 74.

[4] As with other aspects of the investigation, Vaughn kept no notes or records of his meetings or conversations with Furman. TR II-107. Neither did Furman. TR III-291.

– Vaughn gave Furman the impression that Huson declined to put the money in the city vault on *Sunday*, the day the money was stolen. TR III-288-289, 312. But Vaughn knew that it was on *Saturday*, not Sunday, that Huson took the money home for safekeeping rather than put it in the city vault, and that Huson returned the money to the concession stand on Sunday, after which the money was delivered to Huson for safekeeping without his having asked for it. EX 1-S (SER 54); TR IV-601, 611, 620-621; EX 1-E (SER 8).

– Vaughn also gave Furman the impression that Lorton had no way of knowing the money was in Huson's car trunk, and Furman thus was unaware that Lorton "did yard work" near the car the Sunday afternoon the money was placed in the car. TR III-312-313, SER 40.

– Vaughn did not tell Furman "about Mr. Huson's prior trustworthiness with Lions Club money . . . " (TR III-302), that Huson had a "long history with the Lions Club and had handled money for years and was trusted" (TR II-111-112), and that "[Huson] had been a member of many civic groups in Castle Rock where he had handled their money without incident for years" (TR II-111).

– Vaughn failed to disclose his prejudice against Huson due to conflicts from their prior working relationship and his role as Huson's political adversary. TR II-111.

– Vaughn led Furman to believe that Huson "had stopped hanging around his old haunts" (TR III-310) by exaggerating reports that Huson did not get together as often with Lions Club members for morning coffee at a local restaurant. EX 1-S SER 54.

– Vaughn led Furman to believe that he was obtaining "written statements from potential witnesses" about Huson's "change of habits issue" and that Vaughn was "following . . . up" on investigating Lorton's excuses for fleeing in the middle of the night. TR III-297, 306, 311. Instead, after obtaining a statement that Huson did not come by to drink coffee in the morning, he made no effort

to obtain evidence that Huson "had stopped hanging around his old haunts," and never determined that a tree planter named Flores even existed, let alone had a house to which Lorton might have fled the night of the theft.[5]

– Vaughn never told Furman that he failed to check Lorton's criminal history, that Lorton refused to take a polygraph, or that Huson had family and friends, potential sources who could have lent the deposited money. TR III-295, 302-303, 307.

On the day of the arrest Vaughn came to Huson's home and said he wanted to talk. Huson invited him in. TR III-239. The first thing Vaughn said was that he had gone to see Lorton and that he did not think Lorton took the money. *Id.* Huson asked who Vaughn thought took it, and Vaughn replied that if Huson did not admit he stole the money he was going to jail. *Id.* When Huson would not confess to the theft and asked to speak with an attorney, Vaughn arrested him on the spot. TR III-240.[6]

According to Vaughn, Huson was a flight risk (TR II-108), even though he was a lifelong community pillar with a home, rental property, family and friends in Castle Rock. Vaughn also testified that Furman said that if Huson invoked his *Miranda* rights Vaughn should arrest him. TR II-109. Furman, however, denied telling Vaughn that Huson should be arrested if he asked to speak to an attorney (TR III-314), one of the *Miranda* rights.

Vaughn locked Huson up in the county jail. During Huson's booking, Vaughn laughed at him. TR III-240. On August 10, 1988, based on the incomplete and erroneous

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[5] There is no record support for petitioners' assertions that Flores "had told Lorton that Flores might have a job for [him]" or that Lorton left early in the morning "because Flores leaves very early for work." Petition at 5-6.

[6] Vaughn told a different story, which the jury was entitled to reject.

information Vaughn provided, Furman charged Huson with theft. Shortly thereafter, Huson's counsel asked the prosecutor's office to have the handwriting of the notes analyzed. EX 9-F SER 69. In October, the court granted Huson's motion to compel a handwriting analysis of the two notes. TR III-316. The analysis conclusively showed that Lorton had written the "I'm leaving for California" note before fleeing and that Huson did not write the "theft tally." The analysis was inconclusive as to whether Lorton wrote the numbers on the "theft tally." EX 25-B SER 76. The analysis eliminated Huson as a suspect, but not Lorton.

On January 12, 1989 the prosecutor's office stated it would dismiss the case. Displaying further animosity towards Huson, Vaughn told newspaper reporters that a dismissal did not "prove the former mayor is innocent" and that "a dismissal is not the same as an acquittal."[7]

On February 28, 1989 the case against Huson was formally dismissed. Vaughn performed no further investigation on the case and never arrested Lorton. TR II-128.

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[7] The *Daily News* accurately reported the following statement about the dismissal:

> 'At this point I have no new or additional suspects or information.' Vaughn said he knew Huson couldn't be brought into court again after Thursday's action, but he said that doesn't prove the former mayor is innocent.

Exhibit 22-January 13, 1989; TR II-125. The *Cowlitz County Advocate* accurately reported:

> Vaughn said he does not plan to re-open the investigation, and he did not wish to comment on the dismissal. He added, however, that 'a dismissal is not the same as an acquittal.'

Exhibit 22-January 18, 1989; TR II-125.

REASONS FOR DENYING THE WRIT

Summary of Argument

None of the considerations in Supreme Court Rule 10 governing review on Writ of Certiorari exist in this case. Municipal liability was correctly imposed on Castle Rock because its chief of police, Vaughn, had final policymaking authority on how, and to what extent, criminal investigations were conducted and arrests made, and arrested Huson without probable cause and with reckless disregard for or deliberate indifference to his rights.

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court recognized that making a municipality liable for constitutional violations by its final policymakers is not an application of *respondeat superior*. There is no conflict among the circuits that an unconstitutional arrest by an official with final policymaking authority for police investigations and arrests subjects the municipality to liability.

The correct standard of qualified immunity was applied in this case – whether a clearly established right existed and whether a reasonable officer could have believed there was probable cause for the arrest. Petitioners stipulated at trial and conceded on appeal that the law was clearly established at the time of the arrest. Because evidentiary disputes had to be resolved by the jury before the ultimate question of the reasonableness of Vaughn's conduct could be resolved, the district court submitted the qualified immunity defense to the jury. Even if it were possible to separate the evidentiary and the ultimate fact disputes – by having the jury resolve the former on special interrogatories and the district court resolve the latter – the petitioners never requested that the district court do so. Moreover, in denying petitioners' motions for directed verdict and JNOV, the district court found the defense of qualified immunity lacking. The facts overwhelmingly show that Vaughn's investigation

and arrest of Huson could only have been done by an officer who was plainly incompetent and had a reckless disregard for or callous indifference to Huson's constitutional rights.

I.

There was substantial evidence supporting (1) the district court's determination that Vaughn was a policymaker and (2) the jury's verdict of municipal liability finding that Huson's civil rights were deprived pursuant to official policy, under an instruction – unchallenged by petitioners below as a correct statement of the law – that official policy includes an unconstitutional act resulting from a policymaker's reckless disregard for or deliberate indifference to Huson's rights.

Municipal liability arises under 42 U.S.C. §1983 for "deprivations of federally protected rights caused by action taken 'pursuant to official municipal policy of some nature. . . . ' " *Pembaur*, 475 U.S. at 471, quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978).[8] "[O]nly those municipal officials who have 'final policymaking authority' may by their actions subject the government to §1983 liability." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988), quoting *Pembaur*, 475 U.S. at 483. "[W]hether a particular official has 'final policymaking authority' is a question of **state law**." *Praprotnik*, 485 U.S. at 123 (emphasis in original), quoting *Pembaur*, 475 U.S. at 483. It is a "legal question to be resolved by the trial judge **before** the case is submitted to the jury . . . [r]eviewing the relevant legal materials, including state and local positive law, as well as 'custom

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[8] Whether or not Vaughn is entitled to qualified immunity has no effect on the existence of municipal liability. *Los Angeles v. Heller*, 475 U.S. 796 (1986); *Owen v. City of Independence Missouri*, 445 U.S. 663 (1980).

or usage' having the force of law," *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989) (emphasis in original), citing *Praprotnik*.

The district court instructed the jury that Castle Rock is liable only if the violation of Huson's constitutional rights, if any, occurred pursuant to official policy or practice of Castle Rock. *Huson II*, at A-14-15. The jury was further instructed that official policy includes "[a]n unconstitutional act resulting from a policy maker's reckless disregard for or deliberate indifference to the rights of plaintiff." *Id.* Petitioners conceded that "municipal liability may . . . arise where the official, whose acts caused a constitutional injury, is the 'final policy maker' with respect to the discretionary decision involved." Petitioners' Brief (to the 9th Circuit) at 34. Although the "district court did not make an express finding that Vaughn was a final policy-maker, . . . he implicitly made such a finding by submitting the municipal liability issue to the jury." *Huson II*, at A-14, n.4. The 9th Circuit held that the evidence supported the conclusion that Vaughn was a final policy-maker for Castle Rock and that his deliberately indifferent actions gave rise to municipal liability. *Huson II*, at A-16.

Petitioners acknowledged that there was evidence that Vaughn "may have made police policy." TR IV-554. Indeed, the uncontradicted evidence showed that "Vaughn made all the policy for the police department," and that "[n]o one ever interfere[d]" with Vaughn's policymaking authority. TR II-195. Thus, Vaughn possessed final authority to set policy on how, and to what extent, criminal investigations were conducted and arrests made, including the investigation and arrest for the Lions Club theft.

Castle Rock asserts that more is required for municipal liability, contending there must be evidence that Huson was "arrested pursuant to an express or *de facto* municipal policy." Petition at 9. No express policy exists,

it argues, for the City Council had not "promulgated a policy authorizing warrantless arrests without probable cause [or] . . . delegated to Vaughn the authority to promulgate such a policy." *Id.* at 12. Castle Rock argues that there could be no *de facto* policy because neither Vaughn nor any other City officer "had made prior arrests without probable cause," and the City lacked "actual or constructive knowledge of prior unconstitutional arrests." *Id.* at 14.

Castle Rock further contends that it cannot be liable based on Vaughn's policymaking authority "because whatever policy-making authority Vaughn may have had did not include the authority to make policy regarding the level of suspicion required for warrantless arrests, as that policy was controlled by a state statute governing such arrests." *Id.* at 9. It contends that "Vaughn's discretion with respect to arrests was constrained by a policy that was not of Vaughn's making (i.e., a statute)." *Id.* at 12-13. According to Castle Rock, even if "Vaughn acted with reckless disregard for Plaintiff's rights," no municipal liability attaches because "discretionary decisions made by public officials within the parameters of an existing policy [cannot] . . . subject a public body to liability under Section 1983." *Id.* at 9-10. Finally, it argues that an arrest "mistakenly" made by a police chief is no different than if it were done by any other officer (*id.* at 13) and that to impose liability under these circumstances amounts to "holding the City liable on the basis of *respondeat superior*." *Id.* at 16.

Castle Rock misconstrues the holdings of this Court in *Pembaur* and its progeny. In *Pembaur*, pursuant to direction from a county prosecutor, deputy sheriffs chopped down the door of a doctor's medical clinic to arrest witnesses who were believed to have information of the doctor's alleged fraudulent practices. This Court held that the county prosecutor's unconstitutional act could

subject the county to liability under §1983, observing that official policy need not refer to "formal rules or understandings." *Pembaur*, 475 U.S. at 480-481. "If the decision to adopt that particular cause of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." *Id.* at 481 (fn. omitted).

> "[L]ike other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no[t] . . . an application of the theory of *respondent superior*. . . . "

Pembaur, 475 U.S. at 483. Similarly, the Castle Rock City Council need not promulgate a policy authorizing warrantless arrests without probable cause to render the city liable for such unconstitutional conduct.

In *Pembaur* the prosecutor's discretion was constrained by a policy that was not of his making (i.e., the 4th Amendment). Despite that constraint his "considered decision based on his understanding of the law . . . directly caused the violation of [Pembaur's] Fourth Amendment rights." *Pembaur*, 475 U.S. at 484. Because he was a "final decisionmaker for the county, . . . the county may therefore be held liable under §1983." *Id.* at 485. Similarly, although Vaughn's discretion was constrained by a state statute (as well as the 4th Amendment) not of his making, his decision to arrest Huson "directly caused the violation" of Huson's constitutional rights. As a final decisionmaker for Castle Rock in the area of criminal investigations and arrests, his acts subjected Castle Rock to liability under §1983.

Petitioners' reliance on language in *Praprotnik* – "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinates' departures from them, are the act of the municipality" – is misplaced. Petition at 12 (citing *Praprotnik*, 485 U.S. at 127). The statement was an effort to explain that the "authority to make municipal policy is necessarily the authority to make **final** policy." *Id.* (emphasis in original). This Court explained that if a subordinate lacks policymaking authority in an area in which he acts, his departures from municipal policy do not become an act of the municipality. At the same time, this Court reaffirmed that municipalities are liable for "acts which the municipality has officially sanctioned or ordered." *Id.* at 123 (citing *Pembaur*, 475 U.S. at 480). This Court did not limit "officially sanctioned or ordered" acts for which the municipality may be held liable to those for which no constraining policies exist. Otherwise, no conduct would ever subject a municipality to §1983 liability, for all official conduct is necessarily constrained by the federal constitution and laws or state law incorporating their standards.

The absence of prior arrests without probable cause, if true, is irrelevant. "[A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur*, 475 U.S. at 481. "[W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Id.*

Petitioners wrongly characterize Vaughn's arrest of Huson as a mere "mistake" and equate it with a "mistaken" arrest made by a subordinate officer. But Vaughn's arrest of Huson was no mere mistake. It demonstrated both incompetence (*see* part II below) and deliberate indifference. Moreover, carried out by a police chief with

final policymaking authority in the area of investigation and arrest, it differed from an arrest by a subordinate officer. He was one "whose acts or edicts may fairly be said to represent official policy." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). Vaughn had the power to assume control of the investigation; his subordinates did not. Vaughn had no overseer for his activities or choice of conduct in his investigation. His choice of conduct became the official and accepted choice of conduct for the Police Department and the City. It "constitutes a kind of 'statement' about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases." *Praprotnik*, 485 U.S. at 171 (Stevens, J. dissenting). In this case the assumption is well-founded: Vaughn refused to concede Huson's innocence in the face of conclusive exonerating forensic handwriting evidence.[9]

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[9] There is no conflict among the circuits that municipal liability is established by the circumstances of this case. *Small v. Inhabitants of City of Belfast*, 796 F.2d 544 (1st Cir. 1986) (city manager's unconstitutional discharge of special police officer could subject city to liability if manager had final authority to revoke officer's appointment); *Cordero v. DeJesus-Mendez*, 867 F.2d 1 (1st Cir. 1989) (municipality liable for unconstitutional discharge of employee by mayor whose acts represented official policy); *Williams v. Butler*, 863 F.2d 1398 (8th Cir. 1988) (*en banc*), *cert. den.*, 109 S.Ct. 3215 (1989) (city liable for unconstitutional discharge of municipal court clerk by municipal court judge to whom state law gave absolute delegation of authority regarding employment matters); *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985), *cert. den.*, 106 S.Ct. 1635 (1986) (city liable for mayor's ordering police to arrest commissioners who were meeting without authority); *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989) (city liable for reprimands of police officers' off-duty behavior by Chief of Police who was delegated final authority to issue reprimands); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir.

Castle Rock also argues that there can be no municipal liability for a policy maker's reckless disregard or deliberate indifference where no "public body . . . has made a decision not to take some action to protect the rights at issue." Petition at 15. Castle Rock has waived its challenge to the jury instructions on this basis of municipal liability,[10] and the 9th Circuit found substantial evidence supporting the verdict on this basis (*Huson II*, at A-16).

Finally, Castle Rock argues that there was no evidence supporting the other two bases for municipal liability on which the jury was instructed.[11] But a general verdict will be upheld when at least one theory of liability is supported by adequate evidence, even if alternative bases are not supported (*Griffin v. United States*, 112 S.Ct. at 469), particularly when it is possible "from the record to say upon which of the [theories] the verdict was based. . . . " (*Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 79 (1907)). It is possible to determine that the jury

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1989) (county liable for firing of employee by assessor who had final authority to set employment policy as to hiring and firing of his staff).

[10] Neither "the substance of this instruction [n]or the law applied by the district court" was challenged at trial or on appeal. *Huson II* at A-16, TR V-706-707. In any event, the instruction setting forth this basis of municipal liability was a correct statement of law. Actions "reflect[ing] a 'deliberate' or 'conscious' choice by a municipality – a 'policy' . . . – can [render] a city . . . liable for such a failure under § 1983. *"City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

[11] Petitioners also cite *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), and *Sunkist Growers v. Winckler & Smith Co.*, 370 U.S. 19 (1962). But these cases are inapplicable, since they involve submitting theories to the jury based on erroneous statements of the law – not at issue here – rather than theories not supported by the evidence. *Griffin*, 112 S.Ct. 466, 474 (1991).

based its verdict of municipal liability on a finding of a policy maker's reckless disregard for Huson's rights, because, in awarding punitive damages, the jury necessarily found such conduct by Vaughn. The 9th Circuit found substantial evidence supporting the jury's verdict on punitive damages (*Huson II*, at A-13), and petitioners make no challenge to the award.[12]

II.

The courts below correctly determined that no reasonable officer would have believed there was probable cause for Huson's arrest and that Vaughn was not entitled to qualified immunity.

A. The courts below correctly applied the proper qualified immunity standard.

Under the qualified immunity defense articulated by this Court in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), a police officer effecting a warrantless arrest is entitled to qualified immunity from a suit for damages if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." Thus, the "doctrine has two prongs: (1) whether a clearly established right existed, and (2) whether a reasonable officer could have believed, in light of settled law, that his actions did not violate that right." *Act Up!/Portland v. Bagley*, 988 F.2d 868, 875 (9th Cir. 1993) (Norris dissenting from Court's failure to hear case *en banc*). Consequently, the defense of qualified immunity is available either if no clearly established right existed or if a reasonable officer

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[12] Moreover, Castle Rock's "failure to request a special verdict as to each factual theory in the case prevents [it] from pressing this argument on appeal." *McCord v. Maguire*, 873 F.2d 1271, 1273 (9th Cir. 1989).

could have believed his actions did not violate that right. The courts below correctly applied this standard.

1. Petitioners stipulated at trial and conceded on appeal that the law was clearly established at the time of the arrest.

Petitioners now assert that "there was no clearly-established law requiring an officer who had probable cause to do additional investigation to try to obtain exculpatory information." Petition at 21. But the petitioners stipulated at trial and conceded on the interlocutory and post-trial appeals that the law was clearly established at the time of the arrest: "The parties do not dispute that the relevant constitutional standards regarding probable cause to arrest were well established at the time of [Vaughn's] arrest of [Huson] on August 4, 1988." *Huson I*, at 2. "[W]hether the right allegedly violated was clearly established . . . is not disputed by the parties." *Huson II*, at A-10 n. 2. Petitioners may not now argue otherwise.

Moreover, to ask whether an officer who has probable cause needs to do additional investigation begs the question. The need for further investigation was not to confirm there was probable cause to arrest Huson, but because there was no probable cause in the first place. If "no reasonable officer in Vaughn's position could have believed there was probable cause to arrest Huson . . . [a] reasonable officer would have made further inquiry before effecting a warrantless arrest," *Huson II* at A-12. An officer who lacks probable cause to arrest a suspect need never ask whether, if probable cause did exist, he or she must try to obtain exculpatory information.

2. The courts below correctly applied the qualified immunity standard when they asked whether a reasonable officer could have believed that probable cause existed.

Regarding the second prong, the standard set forth in *Anderson* was applied by (1) the 9th Circuit when it summarily affirmed the district court's refusal to dismiss based on qualified immunity on the eve of trial ("a reasonable police officer . . . would have known that he lacked probable cause to arrest" (*Huson I* at 2)); (2) the district court which incorporated this standard into the jury instruction "**stipulated** to by the parties" (whether "a reasonable officer . . . could have believed that probable cause existed" (Petition at A-11, n. 3)); and (3) again by the 9th Circuit affirming the district court's denials of Vaughn's motions for directed verdict and JNOV ("no reasonable officer . . . could have believed there was probable cause to arrest" (*id.* at A-12)).

Petitioners nevertheless argue that the 9th Circuit did not apply the correct standard, contending that the Circuit's analysis violated *Hunter v. Bryant*, 112 S.Ct. 534 (1991) by "equating the 'reasonableness' involved in the question whether there is probable cause with the 'reasonableness' that bears on the entitlement to qualified immunity." Petition at 23. As a premise for this argument, petitioners mis-cite the 9th Circuit's opinion:

The 9th Circuit stated that its "previous **discussion** (*Huson II* at A-12) [not "**decision**," as petitioners misstate, Petition at 22] about the lack of probable cause is dispositive of the qualified immunity question." In "discussi[ng] . . . the lack of probable cause" (*Huson II* at A-12) the court looked at the "totality of the facts and circumstances within the officer's knowledge and of which he or she has reasonably trustworthy information" to determine whether they "are sufficient to warrant an

officer of reasonable caution and prudence in believing that the person to be arrested has committed a crime" (*id.* at A-6). After examining the evidence, the court concluded that "there was substantial evidence to support the jury's special verdict" that Huson was "arrest[ed] without probable cause." *Id.* at A-7. Referring to its "previous discussion" about this evidence, the court then concluded that there was "[s]ubstantial evidence support[ing] the jury's determination that no reasonable officer in Vaughn's position could have believed there was probable cause to arrest Huson . . . ." *Id.* at A-12. This is precisely the standard set forth in *Anderson* and reaffirmed by this Court in *Hunter* governing the availability of the qualified immunity defense: whether " 'a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.' " *Hunter*, 112 S.Ct. at 536, quoting *Anderson*, 483 U.S. at 641.

The standard employed by the 9th Circuit properly immunizes "law enforcement officials [who] . . . reasonably but mistakenly conclude that probable cause is present," i.e., those "officials who act in ways they reasonably believe to be lawful. . . . " *Anderson*, 483 U.S. at 641. But this standard does not protect the "plainly incompetent or those who knowingly violate the law." *Hunter*, 112 S.Ct. at 537, *quoting*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Vaughn's conduct was both plainly incompetent (*see* II.C.) and "driven by evil motive or intent, or . . . involved a reckless or callous indifference to . . . [Huson's] constitutional rights. . . . " (*Huson II* at A-12).[13]

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[13] Petitioners complain that the 9th Circuit erred by asking "whether there was evidence from which the jury could conclude that Vaughn was not entitled to qualified immunity." Petition at 19. This was not the standard of review used by the court. Instead, the court asked whether substantial evidence existed to support the determination that *Hunter* requires,

B. The district court properly submitted the issue to the jury.

In determining whether a law enforcement official meets the second prong of the defense of qualified immunity, the "relevant question . . . is [an] objective (albeit fact-specific) question. . . . " *Anderson*, 483 U.S. at 641. While this Court has stated that "[i]mmunity **ordinarily** should be decided by the court long before trial" (*Hunter* 112 S.Ct. at 537 (emphasis added)), use of "[q]ualifiers such as 'routinely' and 'ordinarily' imply that the question in **some instances** should indeed be decided by the jury." *Act Up!/Portland*, 988 F.2d at 881 (Norris dissenting) (emphasis in original). Indeed, a qualified immunity ruling is a "legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Mitchell v. Forsyth*, 472 U.S. 511, 529, n.10 (1985). Where, as here, the courts below each **twice** found that the defense of qualified immunity turned on disputed issues of fact, the issue had to be submitted to the jury.[14]

Only because the material facts in *Hunter* were "undisputed" (112 S.Ct. at 537), was this Court able to decide the issue of qualified immunity in that case before trial. By contrast in this case, before the issue of qualified immunity could be decided, the jury had to resolve factual disputes, e.g., what transpired when Vaughn arrested Huson. Even if it were possible to separate these factual disputes from the

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namely, that "no reasonable officer . . . could have believed there was probable cause to arrest Huson. . . . " *Huson II*, at A-12.

[14] The district court denied petitioners' motions for summary judgment before trial and for a directed verdict at the close of Huson's case, and both rulings were affirmed by the 9th Circuit, once on an interlocutory appeal, and again on appeal from the final judgment.

ultimate fact question of the reasonableness of Vaughn's conduct – i.e., have the jury resolve factual issues on special interrogatories, leaving to the court the ultimate question of reasonableness based on the jury's special findings – petitioners made no such request.

Petitioners nevertheless argue that under the facts and circumstances of this case, qualified immunity was not an issue for the jury. Petition at 16-20. In so arguing, Petitioners disregard the distinction between the questions of whether the law was clearly established and whether a reasonable police officer could have believed that Huson's arrest was lawful, in light of the clearly established law. The former issue is one of law for the court, and in this case it was undisputed. The latter is an objective test, applied only after relevant factual disputes are resolved.

Moreover, both courts below reviewed the jury's determination in ruling on petitioners' motion for JNOV. Even were it improper to have submitted the question to the jury, there can be no error if the courts reviewed that determination and found no qualified immunity.

The facts in *Hunter* were also different from this case. In *Hunter*, Secret Service agents had "trustworthy information that Bryant had written a letter containing references to an assassination scheme directed against the President, that Bryant was cognizant of the President's whereabouts, that Bryant had made an oral statement that '[h]e should have been assassinated in Bonn,' . . . and that Bryant refused to answer questions about whether he intended to harm the President." *Id.* at 537. The court held that the issue was whether "the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed. . . . " *Id.*,

at 537. As discussed below, there was overwhelming evidence that no reasonable officer, let alone "another reasonable, or more reasonable" officer, could have concluded that probable cause existed for Huson's arrest.

C. No reasonable officer could have believed there was probable cause to arrest Huson.

Viewing the evidence in the light most favorable to Huson, no reasonable officer could have believed there was probable cause for his arrest. As the 9th Circuit concluded, a "reasonable officer would have made further inquiry before affecting a warrantless arrest" (*Huson II* at A-12), and Vaughn had "conduct[ed] an incomplete investigation of the prime suspect, the juvenile boarder" (*id.* at A-13). From the outset, it was obvious that Lorton had stolen the money:

– Lorton was a juvenile delinquent in custody for theft and had already committed two thefts (from Huson and another boarder) while in custody at Huson's home.

– The night of the theft, Lorton fled from Huson's home where he had been placed by juvenile authorities.

– The fugitive Lorton left behind a note with the implausible story that in the middle of the night he decided suddenly to leave town with some friends from California.

– Lorton left behind a second note on which the stolen funds were tallied.

From these facts, everyone involved with investigating the crime at the outset concluded that Lorton was the thief. A prosecuting attorney agreed with the officers investigating the theft that there was probable cause to arrest Lorton and prosecute him for the theft. Even

Vaughn conceded that Lorton should be arrested for the theft.[15]

Huson's cash bank deposits provided no basis for Vaughn to conclude that Huson was the thief. When Vaughn learned that his political rival had made cash bank deposits shortly after the theft, he drafted a subpoena to inspect Huson's bank records. But before even examining those records or turning up any evidence exonerating Lorton, Vaughn inexplicably ceased pursuit of Lorton.

In due course Vaughn looked at Huson's bank records. However, the records provided no basis to believe that Huson's cash deposit, in the middle of the month following the theft, was unusual, either in amount, form, or time of the month. Rather, the records showed that Huson made deposits in similar amounts throughout the month, and the records did not differentiate between deposits by check or in cash. EX 1-K SER 35.

Huson had identified Lorton as the author of the note on which the thief tabulated the money. Thus, if there was any reasonable basis to doubt that Lorton was the thief and believe there was probable cause that Huson was trying to frame a juvenile for whom he provided foster care, it was rudimentary that a handwriting analysis be performed. Such an analysis, which confirmed Huson's innocence, was not done until Huson obtained a court order requiring it, after Vaughn arrested him and charged him with the theft.

Vaughn's expert agreed that the "theft tally" was the "primary piece of evidence." Indeed, it was the only

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[15] Vaughn said that he would have arrested Lorton if he had known Lorton's whereabouts. But Vaughn demonstrated his lack of interest in the real thief by failing to use available information to locate Lorton.

forensic evidence found in the case. When asked if it was "significant," he responded, "[a]bsolutely." TR IV-668. Vaughn knew that a handwriting analysis should have been done: he planned to take handwriting exemplars with him when he interviewed Lorton, but later claimed he "forgot" to do so. TR II-69. Vaughn's expert also said that even without exemplars, just by looking at the notes and noting the "similarity" "you would say [Lorton] was lying" when he denied writing the implausible "I'm leaving for California" note. TR IV-668; *see* EXs 1-B and 1-C SER 5-6. "[A] police officer evaluating a situation for probable cause must utilize the means at hand to minimize the risk of error." *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986). "A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest." *Id.*

Lorton's denial of writing the "theft tally" and his excuses for fleeing in the night were incredible and inconsistent and further implicated him as the thief. Even Vaughn thought Lorton was lying to him during their interview when Lorton denied writing the "I'm leaving for California" note.

Moreover, the new story Lorton gave in the interview with Vaughn was both incredible and inconsistent with the "I'm leaving for California" note.[16]

A reasonable officer would have had a healthy skepticism for these stories, already inherently incredible, presented by a fleeing suspect with an extensive history of theft. A reasonable police officer does not rely on information which is not "trustworthy" to form probable

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[16] The new story was that Lorton fled in the night to carry-out a long-time plan to go to Alaska with the alleged tree planting contractor who already had left for work shortly after 1:30 a.m.

cause. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). No reasonable officer could have believed there was probable cause to arrest Huson by eliminating Lorton as the prime suspect *after* Lorton was found to be lying by giving conflicting excuses. Even Vaughn acknowledged that Lorton should be a suspect after Lorton lied to him. TR II-86.

In view of Lorton's almost certain culpability and with critical additional investigation (handwriting analysis) still to do that would have eliminated Huson or Lorton as a suspect, no reasonable police officer would have believed that there was probable cause to arrest Huson.

Ignoring the overwhelming evidence, petitioners argue that Vaughn "reasonably concluded that [Huson] was a suspect" and "that Lorton no longer was a suspect." Petition at 24-25. The jury had good reason to find that no reasonable officer would make these factual inferences:

According to petitioners, Huson had motive and opportunity to steal the money, was unemployed, allegedly facing foreclosure, and had no other apparent sources of income. *Id.* But Huson had employment providing foster care, rental income, and financial resources about which Vaughn would have learned had he asked. TR. II-171-173. Instead, Vaughn presented Huson with an ultimatum to confess or go to jail. Moreover, motive and opportunity are not elements of theft and do not establish probable cause to believe anyone has committed theft. Otherwise, everyone entrusted with money would be subject to arrest without more, if the money they are safekeeping disappears.

According to petitioners, Vaughn was told Huson went to Lions Club meetings less often after the theft. Yet only an incompetent police officer could have failed to learn, be it by investigation or ordinary awareness of

happenings in a small community like Castle Rock, that Huson's activities in the Lions Club **increased** after Lorton's theft of the money. Huson assumed the Lions Club presidency, worked at its concession stand on July 4, 1988, and in the food bank, and was installed as "King Lion" at the club's annual dinner. TR III-256-257, IV-587.

Lorton fled to his home town where his mother and grandmother resided. Ex 1-O SER at 49. According to petitioners, a guilty Lorton would not have fled to his home. Again, only an incompetent police officer would draw such a conclusion. Lorton's police record showed Lorton having fled home after his prior escape from custody. Moreover, "[s]tandard police practice [is to] start looking for someone where their friends and family are," because "[t]hey don't have anyplace else to go." TR IV-546. As one expert stated, "I can't believe [Vaughn] said because [Lorton] went home, he wasn't guilty." TR III-397.

According to petitioners, Lorton's assertion that he had left his boom box and cassette tapes at Huson's home was "inconsistent with flight." Petition at 25. But Lorton **did** flee (which in a criminal prosecution supports an "inference of guilt" (TR III-308)), and any reasonable officer would recognize the impossibility of Lorton's fleeing on a bicycle juggling a boom box and "100+ cassette tapes" (SER 4).

According to petitioners, fugitives like Lorton from juvenile detention facilities like Toutle River would be expected to steal not only the money in Huson's car, but the car as well. Even though Vaughn failed to look into the details of Lorton's extensive history of criminal enterprise, he was aware that Lorton's criminal history included multiple thefts. Surely Lorton's failure to commit grand theft auto would not lead a reasonable police officer to exonerate Lorton from grand theft of cash.

According to petitioners, Lorton would not have risked taking the money into the house to count it. But in the early, dark hours of the morning Lorton had no other place to count the money. Moreover, handwriting analysis that a reasonable officer would have obtained proved that Huson had not authored the tally of the stolen funds.

According to petitioners, Lorton voluntarily submitted to a taped interview with Vaughn and gave a written statement. But Vaughn knew Lorton lied in the interview, and "felt that he probably had good reason." TR II-82.

Finally, according to petitioners, Lorton stated that he was unaware that the money was delivered to Huson. But no reasonable police officer would have believed this denial after Lorton admitted to Vaughn that he "did yard work" near Huson's car the afternoon the money was placed in the car. SER 40.

No reasonable police officer could have believed there was probable cause to arrest Huson.

III. CONCLUSION

None of the considerations in Rule 10 governing review on Writ of Certiorari exist in this case. The Petition for Writ of Certiorari should be denied.

Dated this 20th day of July 1994.

Respectfully submitted,

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